

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6125

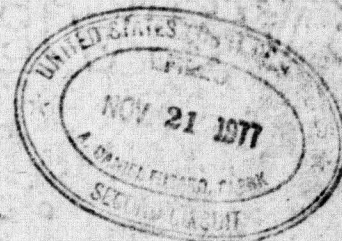
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-6125

B
P/S

IN THE MATTER OF:
ESTABLISHMENT INSPECTION OF:
M & B INDUSTRIES CORPORATION

On Appeal From
The United States District Court
For The Eastern District Of New York



Reply
APPELLANT'S BRIEF

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The previously requested postponement of the arguments in this case was requested principally to properly present this reply brief. Accordingly, Appellee wishes to point out that this brief is incomplete.

Contrary to the claims of the Labor Department, they were never denied entry by an authorized representative of M & B Industries. The only time was on June 15, 1977, when entry was postponed, due to the representatives lateness to a previously scheduled appointment, and the Labor Department did not take up M & B Industries' offer to come another time when M & B's representative was not so busy.

With regards to the regulatory background claimed by the Labor Department, not only has the Labor Department failed to back it up with proof of the usefulness of such regulation, but as the attached Exhibit 'A' shows, this regulation does not accomplish what it was intended to do. Nevertheless, all this is irrelevant to the issues in this case, which is the warrant.

FOURTH AMENDMENT CHALLENGE

Without repeating the various citations as precedents, a warrant, which is the issue here, must constitutionally be based on a sworn showing of probable cause. Here, the probable cause is an unsworn, (in fact, false) letter from the Fire Dept.

The Labor Department seems to claim that the letter is enough.

In a usual case, the Labor Department seeks to inspect on the grounds that the particular factory is of a particular class, such as a particular industry, location, manufacturing method, or the like, or a randomly picked firm. Here, the inspection is based on a "request for an inspection from the New York City Fire Department," and not a regular or random inspection program. However, this "request" is only with respect to "public safety", a matter wholly out of the jurisdiction of the Labor Department (which is restricted to employee safety), and makes no reference at all to "poor housekeeping" (the basis for the Labor Department's Application), a convenient catch-all phrase to use since it is so vague. This would indicate that the Labor Department had some other communication with the Fire Department, and they would therefore have known that this letter is false.

To summarize this argument, any suggestion of no need for a warrant applies only to an emergency situation, which this case definitely is not. This inspection is not part of a regular Labor Department inspection program, but rather is based on an unsigned, unsworn, not notarized "request" for an inspection which is completely false anyway from beginning to end, and of which (this letter) M & B was improperly denied an opportunity to challenge, despite its request to challenge, as the minutes of the hearing shows.

THE JURISDICTIONAL ARGUMENT

The Secretary of Labor claims in his Brief, that he "need not show that the employer is a covered employer under the Act prior to conducting an inspection pursuant to the Act. Questions of coverage and/or exceptions must be adjudicated in the administrative forum provided by the Act."

Though this may need to be adjudicated in an administrative forum, the application for inspection to the District Court is based on the Act, and if M & B is not a covered employer, an application to inspect it is improper.

THE CONCURRENT JURISDICTION ARGUMENT

This argument is not so much that a workplace subject to inspection by a local agency is not subject to the Labor Department (although it is that too), but that since this matter is more properly (since it comes from) the New York City Fire Dept., the Labor Department is without jurisdiction. In fact, the Labor Department's Brief ignores the Assistant Secretary of Labor's letter of April 15, 1976 (printed in the Federal Register of April 23, 1976), so that the Labor Department's response to this argument is no argument.

(The Fire Department's letter, in fact, refers to "public safety" of the building and not to employee's safety of the workplace, so this matter falls under the Assistant Secretary of Labor's April 15th letter, and not under Section 8(a) of the Act, as the Labor Department claims in its Brief's footnote 15. This letter accepts the Labor Department's limited jurisdiction based on the Congress limiting its jurisdiction in its latest appropriations bill before the date of the letter.) SEE EXHIBIT "B"

CONCLUSION.

For the foregoing reasons, Defendant & Appellant M&B INDUSTRIES CORP.'s appeal should be granted.

Abraham Friedman
Abraham Friedman for
M&B Industries Corp.

I hereby certify that copies of the foregoing
reply brief were served this day of november
1977 by first class mail,

to Francis La Ruffa reg solicitor
Dept of Labor 15/5 Broadway New York, N.Y.

*Received &
11/21/77*

John M. Summer

PERFORMANCE RECORD: COST VS. BENEFITS

When Congress passed the Occupational Safety and Health Act in 1970, only interest groups and specialists paid much attention. After all, the Congress had created so many regulatory agencies in recent years that the addition of one more hardly seemed much of a news item. Since that time, however, OSHA has made a name for itself. The Occupational Safety and Health Administration is clearly the most controversial federal agency in the history of social legislation. Originally given the blessing of practically every official voice in the nation, (passing the Senate and the House by votes of 83-3 and 383-5 respectively), the agency is now almost universally scorned.

OSHA's regulations, which are binding on every employer and cover over 800 pages of the *Federal Register*, often contain such minute detail as to be impossible to comply with. Even if employers could be in strict compliance, there is no evidence that the vast majority of regulations would have any effect on worker safety anyway. A close look at OSHA's performance record, its regulations, and some of the ways OSHA has tried to enforce these regulations will give a better idea as to why there is a growing movement to bring the agency to a halt.

BENEFITS

The most damaging statement to be made regarding OSHA is that in over six years of existence, with billions of dollars spent, as well as provoking the antagonism of nearly every businessman in the country, the agency has had no significant impact on worker safety and health whatsoever. In fact, since the Bureau of Labor Statistics began recording OSHA's performance in 1972, the number of work days lost due to injuries, per 100 workers, has increased 15 percent. OSHA is unable to offer any statistical proof that if the agency were never created in the first place, there would be any change in work injury rates.

Table 1 uses data from the Labor Department's Bureau of Labor Statistics (BLS) and the National Safety Council (NSC), a

EXHIBIT A

Table 1**BLS****LOST WORKDAY CASES
PER 100 FULL-TIME WORKERS**

1972	47.9
1973	52.0
1974	54.6
1975	56.1

NSC
"Work Injury Rates"
(1976 Edition)**SEVERITY**

1972	655*
1973	654
1974	614
1975	752

*Severity rate is the total charges (in days)
per 1,000,000 manhours of work.**Private Nonfarm Sector****Table 2****BLS****TOTAL RECORDABLE CASES
PER 100 FULL-TIME WORKERS**

1972	10.9
1973	11.0
1974	10.4
1975	9.1

NSC**ALL DISABLING
INJURIES**

1972	10.17*
1973	10.55
1974	10.20
1975	13.10

*The number of disabling injuries per
1,000,000 manhours of work.**Private Nonfarm Sector****Table 3****BLS****WORK-RELATED FATALITIES**

1972	5,500
1973	5,100
1974	5,900
1975	5,300

NSC**FATALITIES**

1972	.06*
1973	.06
1974	.05
1975	.06

*The number of fatalities per 1,000,000
manhours of work.

non-government, non-profit organization.* Both columns indicate the severity of accidents has increased dramatically over the past few years. (The number of lost workdays is an indicator of severity in BLS data.) Deputy Assistant Secretary Burt Concklin admits that these figures are disappointing. In the past few years, OSHA's prime inspection targets have been those industries with the greatest severity of accidents.

The second table shows very conflicting data. On the one hand, BLS indicates that in 1975 the total accident cases per 100 workers went down about 11 percent. BLS points out, however, that part of the decrease can be attributed to higher unemployment in 1975. This is because the last people hired by a firm are the first people fired in times of recession, and they are usually the greatest safety risks. Thus, rising unemployment indicates the firing of relatively new employees, which forces accident rates down. Also, in 1975 there was a disproportionate drop in manufacturing and contract construction employment. Both industries have higher injury rates than the rest of the private sector. But much to the embarrassment of the Labor Department, the NSC reports a sharp increase in injury rates in 1975. In fact, the 1975 figure represents by far the greatest rise in injury rates since the NSC began taking the data in 1926. NSC rates may not be fully comparable from year to year, but such a steep increase in one year's time cannot be ignored.

The third table indicates the number of work-related deaths. OSHA was proud to report that fatalities decreased by 600 in 1975. However, just one year before, fatalities had increased by 800. It would seem ludicrous for OSHA to claim any degree of impact in 1975 when in 1974 they were just as active and deaths went up substantially. A more reasonable explanation is that the data represent normal year to year fluctuations and that OSHA has had no impact.

OSHA's impact in the area of health cannot be accurately determined statistically. Illness rates have little meaning since the effects of exposure to a toxic substance may not appear in workers until 20 or 30 years later. The recording of health statistics relating to on the job illness is a new field that needs much perfecting.

COSTS

Costs of OSHA may be broken down into direct administrative costs of implementation of the agency and costs to business of

*Note that the NSC warns that direct comparison of their data should be made with the realization of a possible difference in coverage from year to year. However, the trends seem fairly clear.

EXHIBIT A CONT

I have requested my agency heads to assess the small business impact of the laws they administer and determine what can be done to ease the burden on the small employer, while still assuring compliance with the law.

In addition, Congress has in the past recommended that OSHA revise its standards to make them more understandable to small businessmen, and in the Department's appropriation bill for fiscal year 1976, directed OSHA to undertake a "review and simplification of existing OSHA standards"

2. Marginal value in terms of employee safety. Many, including some members of Congress, have commented that some of OSHA's standards are unnecessary, have little, if any, relevance to today's workplace, and are directed towards either property protection or safety of the general public. Indeed, Congress in the Department's latest appropriations bill also directed OSHA to undertake:

. . . elimination of so-called "nuisance standards" or standards which do not deal with workplace conditions that are clearly hazardous to the health or safety of workers or are more properly under the jurisdiction of State Departments of Public Health.

OSHA recognizes that some of the national consensus standards that existed prior to 1970 were intended not just for employee protection but also for the protection of the general public and property. In promulgating these standards under section 6(a), OSHA attempted to avoid inclusion of aspects other than those directed at employee safety. Nevertheless, the contention persists that "nuisance" aspects of the standards must still be eliminated.

3. Gaps in the existing OSHA standards. Some have complained that there are gaps in the coverage of OSHA's standards, both as to hazards and kinds of workplaces. A recent example of such an alleged gap is the area of commercial diving.

4. Specification or design versus level of performance provisions. Comment has been generated concerning the performance versus the design or specification type of standard. Many have alleged that OSHA's present safety standards are too design-oriented, and that the design requirements are not always necessary for employee protection. Additionally, it is said that design standards tend to be-

come obsolete quickly and thus are a potential road-block in the way of the growth of new technology. On the other hand, some have stated that performance standards are too general or vague and do not afford sufficient guidance to employers as to what they must do in order to achieve compliance with the standard.

5. The "Code" problem. Another aspect of the above issue is the dual problem posed by incorporating by reference certain ANSI standards and building, fire, and other specification type codes in the standards, thus making compliance with such codes mandatory. Some commentators feel that OSHA should publish the texts of the codes themselves in the body of its regulations so as to give better notice of the requirements of the standard. Others have suggested that OSHA should immediately update its standards when the referenced codes are revised—sometimes more than once a year.

6. New Technology. OSHA recognizes that there are many areas where current technology has surpassed existing requirements with the result that section 6(a) standards are no longer effective. Standards must be constantly studied and revised in order to continue to ensure an adequate level of employee safety despite technological advances. As new methods and techniques are developed, new hazards may be created. OSHA, therefore, is seeking ways of developing new standards which continue to protect employees in the face of rapid advances in technology and the introduction of new industrial processes.

II. The Procedure. To provide for expanded opportunities for the public to participate in the review of existing standards, in the development of a solid information and data base for revision of the standards, and in the consideration of broad issues and possible new approaches, OSHA will apply the procedure described below to selected standards. It is hoped that all those interested in these standards—affected employers and employees, academic and professional experts, federal and state safety specialists, and elected representatives—will avail themselves of this opportunity and will participate in this

pre-proposal stage through the submission of written comments, relevant data and, when scheduled, participation in public meetings.

In this new procedure, entire sections or subparts of 29 CFR Part 1910 which are under review will be published in a notice requesting information and announcing public meetings. Comments will be solicited on all provisions of the standards in question. To aid the public in commenting on the standards and to enhance the value of the comments to OSHA, a discussion of the general issues as outlined above and a paragraph-by-paragraph presentation of comments or requests for revision which have already been received will accompany publication of the text of the standards. It is not intended that such discussion be dispositive of all issues on which comment is requested, however. A sufficient period of time, as specified in the individual notices, will be provided for interested parties to submit written data, views and information.

In addition, a number of information-gathering meetings may be announced with each notice, specifying times and places for each meeting. These meetings will be scheduled at various locations across the country in an effort to encourage and facilitate the widest public involvement. Interested persons will be able to present their views orally and submit exhibits at these meetings, in accordance with the procedures set out in each notice. OSHA suggests, however, that all comments be submitted in written form to every extent possible.

Following completion of the meetings and the time for submitting written comments, OSHA will thoroughly review all the information and views collected as well as any other relevant data. Where appropriate, OSHA will then develop proposals to amend the existing standards and will institute the procedures set forth in section 6(b) of the Act.

(Sec. 6, 84 Stat. 1593 (29 U.S.C. 655); Secretary of Labor's Order No. 12-71 (36 FR 8754)).

Signed at Washington, D.C. this 15th day of April 1976.

MORTON CORN,
Assistant Secretary of Labor.

[FR Doc. 76-11325 Filed 4-22-76; 8:45 am]

M+B INDUSTRIES IS A SMALL BUSINESS
HARD 3 EMPLOYEES ONLY

EXHIBIT 11B^h

